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Coordination of Local and State Bar Activities With American Bar Association Program

By William C. Mathes, of the Los Angeles Bar

The nineteenth annual meeting of the Conference of Bar Association Delegates, held in conjunction with the American Bar Association at Milwaukee, was attended by three delegates from the State Bar and two from the Los Angeles Bar Association. Among the latter was William C. Mathes, who has made a most interesting report of the proceedings to the Board of Trustees. The Bulletin is privileged to print Mr. Mathes' report and suggestions for the information and benefit of its readers.

Bar Reorganization

THE Committee on Bar Reorganization reported that over 300 active bar associations participated in the National Bar Program which was projected at the 1933 meeting of the American Bar Association. The Committee recommended that the Association continue its official sponsorship of a National Bar Program, and the Conference adopted that recommendation.

Not the least of the purposes of the National Bar Program is the closer coordination of the activities of the local and state associations with those of the American Bar Association. The Committee observed that the theory adopted in proposing the National Bar Program "calls for coordination in terms of work, as a foundation for a future closer structural unity by all active associations, rather than for any immediate attempt to develop, through alliance or treaty, a nation-wide federation of all associations. Your committee is of the opinion that such a theory is sound and presents the most constructive plan now available. It is a fair assumption that, with continued effort, a national bar, incomparably more unified as to purpose and effort, and with renewed energy, will become a reality within a few years."

Structural Unity

The first step toward ideal "structural unity" would of course require a coordination of the activities of various local and state associations, so that representation of a local association would be the sole basis for participation in the affairs of a state association. The present structure of the American Bar Association is founded upon a General Council, "consisting of one representative from each state." The General Council nominates the officers of the association and the members of its Executive Committee, and such nomination means certain election.

In addition to one representative on the General Council, each state elects five members to constitute a "State Council." The State Council and the state's representative on the General Council constitute a committee for each state to further the interests of the American Bar Association.

Theoretically, the General Council and the various State Councils are elected by "the members of the Association residing in each state." Actually, under the present system, they are elected by and from among a handful of the members of the Association from each state who happen to be fortunate enough to attend the annual meeting of the Association. (At the 1934 Pasadena meeting of the State Bar of California, a resolution was adopted requesting the Board of Governors hereafter to nominate California's member of the General Council of the American Bar Association.)

California presents a striking example of the difficulties to be encountered in making the American Bar Association what its name implies. It seems we could well afford to lead the way by coordinating the structure and the activities of our local associations and of our State Bar.

The American Bar Association purports to represent the views of the lawyers of the entire nation. The public so considers its acts. It should require no great argument to convince

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EMPLOYMENT DEPARTMENT

NOTICE TO MEMBERS:

THE office of the Bar Association has on file a number of applications of attorneys and legal secretaries who are seeking employment. You are urgently requested to call the Association office any time you are in need of assistance. Your call will receive careful attention, and the service will be rendered without charge to either party.

Set forth below is a statement of qualifications of two applicants:

Attorney, of good appearance and personality, 31 years of age; Scotch-Irish descent; A. B. deg. from U. C. L. A., after completing a double major of pre-medical and history; graduated from Loyola in June, 1933, with an LL.B. Cum Laude; has had a great deal of business experience.

Will accept employment with reputable attorney or firm at salary of $125.00 per month, or would be interested in smaller salary if allowed to handle own practice.

Legal Secretary, of unusual experience and ability; during last 7 years secretary to head of large local law firm; single; supports mother; has had broad experience in legal work; capable of doing research work for briefs, demurrers, motions, etc., and can assemble material for trial briefs; thoroughly familiar with California Law and Procedure, and can handle correspondence, collections, and general office routine without supervision, if necessary.

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the bar of the desirability of coordinating the activities of local associations with those of the state association, and the activities of the State Association with those of the national organization, so that the American Bar Association will become in truth the accurate national spokesman of all associations.

State Bar Integration

The Committee on State Bar Integration reported:

"Fourteen states and one territory now have bar acts. Two states (Illinois and Missouri) have integration in varying extent through judicial order. In sixteen states action of such definite character has been taken and the sentiment for integration is of such strength that it may be said they are on the threshhold of integration either by statute or by judicial order. The ultimate picture, that is one with some form of unified bar in every state, it is evident, will be filled in with increasing rapidity. The logic of events demonstrates its desirability. The aid it offers in the bringing into being of a strong and efficient national bar is obvious.

"One of the most significant developments of the year is the Kentucky Act. In the earlier acts the provisions as to organization and government of the bar were set forth with considerable minuteness. The acts were lengthy and verbose. The present tendency is to leave much of the detail to be laid out by the bar and to call for a larger measure of cooperation between the Bench and the Bar in working out the form of the organization and the method of government. The Kentucky Act is the shortest yet adopted. It has but three sections and in effect directs the Court of Appeals of Kentucky to promulgate rules for the organization and government of the bar. Except for limiting the amount to be charged for annual dues and one restriction on the right of the court to define the practice of law, the Act leaves all details as to organization and government to the court."

Government by Judicial Order

There is an apparently growing demand for organization and government of the Bar by judicial rule or order, rather than by resorting to the Legislature for an enabling statute. On this subject the Committee reported:

"During the past year the subject of integration through judicial order has been vigorously debated. The Missouri rule has expanded its application beyond that applied in Illinois in 1933 and the possibilities in this method of integration are being even more deeply explored in Ohio and Colorado."

This latter movement no doubt reflects the current agitation for the judicial branch of government to assert power independent of the legislative and the executive in dealing with problems affecting, in particular, the operations of the courts and, in general, the administration of justice through the Bench and Bar.

So-called "State Bar Acts" have been adopted in: North Dakota (1921), Alabama (1923), Idaho (1923), New Mexico (1925), California (1927), Nevada (1928), Oklahoma (1929), Utah (1931), South Dakota (1931), Mississippi (1932), Washington (1933), North Carolina (1933), Kentucky (1934), Porto Rico (1934).

Rule-Making Power of Courts

The most important development reported by the Committee on Rule-Making Power and Judicial Councils was the already widely known fact of the enactment by the last Congress of the long advocated measure empowering the United States Supreme Court to prescribe rules of procedure in actions at law in the Federal trial courts. The Committee observed:

"This extension of the rule-making power of the Supreme Court of the United States adds greatly to the importance of developing the plan of co-operation between the federal bench and bar in all the circuits of the country in order to bring the judgment and experience of the bar into play in connection with the formulation of rules and their possible revision from time to time.

"The movement in the direction of broader recognition and exercise of the administrative rule-making powers of the courts has developed during the past year so that it is rapidly becoming one of the major movements in the profession."

With respect to Judicial Councils, the Committee reported:

"The movement for the creation of judicial councils, for the continuous study of the judicial system of the states and of the procedure and practice and their results, continues to spread throughout the country. At the date of our last report, such councils had been created in about fifteen states.

"During the past year, following the report of the special Commission on the Administration of Justice and upon its recommendation, a judicial council was created by the Legislature for the State of New York. A separate commission was also created for the study of rules of substantive law."

State and Local Bar Activities

The Committee on State and Local Bar Activities reported:

"This Committee was created in 1932 for the purpose of collecting information about successful bar association activities, and passing along this information to the various state and local bar associations in the country.

"**'Legal Clinics' Meetings**—This year's report deals with a certain type of bar asso-

ciation meeting, which, for want of a better name, has been called 'legal clinic'—for the reason that such meetings resemble the clinics held by medical societies. These meetings are differentiated from other bar association meetings in that they are devoted solely to the presentation and discussion of practical problems encountered by lawyers in their every-day practice, and are designed to assist those who attend in solving such problems, and in keeping abreast of their profession. The usual plan of such meetings is to have a paper delivered by some lawyer who is an authority on the subject under discussion, following which a general discussion of the subject takes place.

"The inescapable conclusion to be drawn from letters received by this committee is that any local bar association which is not holding meetings of the 'legal clinic' type may well do so with profit to both the association and its members."

Judicial Selection

The Committee on Judicial Selection reported merely:

"In consonance with the suggestions made by the committee in its last report, it is felt that any positive recommendations with regard to methods of judicial selection should await the results of the study for which Mr. Shafroth has been assembling material, through the questionnaires on the subject of Judicial Selection which have been sent to Bar Associations throughout the country during the past year.

"The answers thus far received to the questionnaires seem to indicate a large measure of dissatisfaction with popular election of judges, and a fair degree of satisfaction with appointment by the Governor or selection by the Legislature."

The Conference reluctantly accepted the report, and urged the Committee to present a definite recommendation on this important subject at the 1935 meeting.

Accident Litigation

A great portion of the time set aside for the Conference was consumed in receiving and discussing the reports of the various members of the Committee on Accident Litigation.

The Chairman of that Committee summarized his views thusly:

"The present legal system of redress for motor accidents is not adapted to modern conditions—it is costly, wasteful, productive of court congestion and of fraud, and not calculated to do justice to either party. It is the clear duty of the Bar to devise a better one.

"A Financial Responsibility Law, although unobjectionable, is a mere gesture, does not meet the underlying difficulties, nor will such a law appreciably cure the serious abuses.

"A Compulsory Liability Insurance Law like that in Massachusetts, although solving a part of the problem by insuring responsible defendants in all cases, still retains the present haphazard system of determining liability and will apparently increase both court congestion and the temptation to fraud.

"A law providing for Compensation without Fault, coupled with a provision for Compulsory Insurance, would afford a much more effective and satisfactory remedy to the injured persons and their dependents. Although the cost to the motorists would be measurably greater, this would not seem unfair in view of the fact that, under the present system, the activity of operating motor cars is paying but a small fraction of the aggregate damages caused thereby, whereas this activity, rather than the general public, should pay the entire bill.

"Disregarding the desire of the accident lawyers to preserve their motor accident practice, the principal objection to such a law is the possibility of its resulting in insurance compulsory on the companies, the unfair curtailment of rates through political pressure and perhaps ultimately a State Insurance Fund, of which the present abuses in connection with pensions should be a sufficient warning. These, however, would not appear to be objections which cannot be overcome."

Immediate Urgency

Other members of the Committee presented reports opposing the views of the chairman. All agreed that the problem of administering justice in automobile accident cases is one of immediate urgency and alarming proportions; that at least the many patent defects in our present methods of dealing with such cases should be remedied without delay.

Many of the delegates apparently forgot the capacity in which they were attending the Conference, and obviously reverted to their every-day roles as "plaintiff's attorney" or "insurance company attorney." It was all too apparent that the former feared any such plan as that proposed by the chairman would surely result in the loss of "large percentages" of plaintiffs' recoveries; that the latter feared, not only decreased returns to themselves, but also the spectre of state insurance funds to compete with the insurance companies, similar to the situation existing today under Workmen's Compensation Acts. Destructive criticism abounded, but constructive criticism of the plan was wholly lacking, unless it could be said the urging of a "substitute plan" that lawyers correct the accident litigation evil by taking the field to reduce accidents by urging motorists to "be careful," could properly be termed a constructive suggestion for improvement of

the administration of justice in automobile accident cases.

At the close of almost one full day of discussion, the Conference, by an overwhelming vote, adopted a "double-barreled" resolution rejecting the plan proposed by the Chairman of the Committee, and all similar plans, and urging all delegates to go home and plead with motorists to refrain from having so many accidents.

Cooperation of Press and Bar

The Committee on Cooperation between the Press and the Bar reported:

"The principal achievement has been that the editors and writers of the daily newspapers, the teachers and students in schools of journalism, have been made conscious of the peculiarly sensitive nature of the courts as instruments of public justice, and convinced of the need of special care in publishing stories concerning them. Newspaper men often speak and write in accord with the aims of the committee on these and related subjects; the latest instance which has come to our attention was a pointed article entitled 'Trial by Hullabaloo' by H. L. Mencken in the Evening Sun, Baltimore, May 28. It cannot be claimed that the style or conduct of the press has become perfect, but certainly it is much improved, so that serious offenses in the news articles about courts and litigants have become a less conspicuous evil.

"It is the mature opinion of this committee that the American Bar Association should be kept constantly in touch with the press of the country for the diffusion of expertly prepared news articles and the advancement of its approved projects, through a regularly established and active agency of its own. That the Executive Committee is aware of the need of publicity has been lately revealed by its series of addresses to the public over the radio systems. The newspapers are vastly more important, and can be effectively enlisted only through an organized and competent arm of the Association."

At the suggestion of the Committee on Cooperation between the Press and the Bar, the Conference recommended to the Executive Committee of the American Bar Association that the Association create a permanent News Bureau or Bureau of Press Relations to be organized and equipped for daily service.

Legal Education and Admissions

The Conference held a joint meeting with the Council on Legal Education and Admissions to the Bar. The work of this Council comprised one of the topics for study on last year's National Bar Program.

The Council was of the opinion that the selection of the subject of Legal Education and Admissions to the Bar, for nation-wide study, had served to increase emphasis on the desirability of raising standards. The Council reported that during the year, Alabama, New Mexico and Virginia had been added to the list of nineteen other states demanding at least two years of college work, as a prerequisite to admission.

The twenty-two states now holding superior requirements for admission are: Alabama, Colorado, Connecticut, Delaware, Idaho, Illinois, Kansas, Michigan, Minnesota, Montana, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

I confess I was at a distinct loss to explain to attorneys from Idaho, Washington and Kansas why California's standard remains so low.

Disciplinary Proceedings

At the opening meeting, President Evans said to the Association:

"The term 'lawyer criminal' in its popular application concerns itself exclusively with lawyers who defend persons charged with committing crimes of violence. It cannot be properly so restricted. There are other 'lawyer criminals.' They may sometimes be found amongst those known as 'corporation' or 'business men's' lawyers—men who are never known and would quickly resent being classed as 'criminal lawyers.' They are often prominent and generally respected in the profession and usually occupy themselves with legal matters of great fiscal importance and about their only direct contact with criminal law matters is presented by laws against the so-called 'commercial crimes.' To the extent that they advise clients in advance how to commit crimes, whether 'crimes of violence' or 'commercial crimes'—to that extent they are as clearly 'lawyer criminals' as are any of the so-called criminal lawyers and should receive as such our hearty condemnation.

"It is manifestly proper to endeavor in good faith to direct clients in the conduct of their business so as not to violate the law, but it is quite another matter and most reprehensible for a lawyer, criminal or corporation, to advise clients how to proceed, with the least possible risk, to do that which the lawyer then knows constitutes the commission of a crime—any kind of crime—under the law of the land. So let us not in the future give a too restricted meaning to the term 'lawyer criminal' and let us condemn without fear or favor and discipline unerringly all of our brethren whose activities bring them within the definition.

"Let us in good faith devote ourselves to the task of cleaning our house. It needs it. We know that and the public knows it. Our influence is minimized, our honesty doubted, and our leadership repudiated, all because of

the sins and shortcomings of a relatively few of our brethren. Let us no longer delay the already too long delayed housecleaning."

Ways and means of purging the Bar of undesirables is one of the topics for study on this year's National Bar Program.

Incongruous Picture

Unquestionably, our profession today presents an incongruous picture to the general public. We cry that our profession is overcrowded; yet we permit standards of admission to remain compromised and lowered. We deplore the fact that the public is losing confidence in and respect for our profession; yet we make no effective effort to expel from our ranks those who bring the high calling of the lawyer into disrepute.

In California, those who have watched disciplinary proceedings as carried on by The State Bar will freely admit that the system is cumbersome and ineffective. Indeed, it seems that the most certain result the present State Bar method has accomplished to date is to air the wrong-doings of certain members and to let the public know that nothing in particular is ever done about it.

Pertinent Questions

May I suggest that in our study of the disciplinary problem, the following questions be considered:

1. Is there any real need in an admittedly over-crowded profession for the reinstatement of any person who has once been justifiably disbarred? If not, should it not be the firm and openly declared policy of the Bench and the Bar that a member once disbarred from the practice of the law, can never be reinstated?

2. Does our present system of suspension accomplish anything other than the encouragement of further violations of the rules of professional conduct by the suspended member?

3. Instead of resorting to suspension, would we not accomplish far more by adopting a fixed policy of placing minor offenders on probation, without publicity, with certain disbarment for recidivism, or repeated offenses?

There are many who believe the time is fast approaching when the Bar will be forced to expel from its ranks those members who have proved themselves unworthy, and thereby make economic room for the host of younger men who stand fully equipped awaiting the opportunity for service to the profession.

Attention is directed to the fact that the American Bar Association has published the opinions of the Committee on Professional Ethics and Grievances, and that copies are available without charge to members of the Association.

Conclusion

These additional suggestions occur to me:

First: That in the future the Los Angeles Bar Association select its delegates to the Conference as soon as practicable after the time and place for the next meeting of the American Bar Association is announced;

Second: That the Board of Trustees, or a committee thereof, review with the delegates the questions likely to arise at the conference; and

Third: That the Association send its delegates to the Conference with instructions regarding at least the more important questions that are likely to arise.

Wm. C. Mathes.

JUDGE OR POLITICIAN?

THE Citizens League says the movement for appointive judges in Ohio "seems to be taking definite form." The Plain Dealer, like the league, hopes it may soon materialize in a determined effort to write it into the state Constitution.

Each judicial election is an argument for the appointive judiciary. The recent one, in particular, adds weight to the argument.

Two judges promoted, one of them to the Supreme Court, not because of ability, character or official prestige, but because they have good names to run on. One judge, one of the very best on the local bench, defeated for re-election because he refused to bow to the dictation of a special group in the community. Other judges refused re-election or promotion, in spite of their own eminent fitness, in order to make room for more "popular" candidates.

An elected judge is almost of necessity either a politician or a one-termer. Unless he plays politics he's sunk before he starts.

The nature of the judicial office demands the largest attainable degree of freedom from political influence. Give a judge office by appointment, make it possible to recall him for cause and the state will go far toward restoring its courts to a prestige which, for justice's sake, they should always have.

—Editorial, Cleveland Plain Dealer.

Validity of Default Judgment Entered for Failure of Defendant to Answer Amended Complaint

By Winthrop M. Crane, of the Los Angeles Bar

IF a defendant files his answer to the original complaint, thereby putting in issue the material allegations thereof, but fails to answer an amended complaint identical in substance to the original pleading, is he in default as to the former pleading?

The answer to this question is furnished by our Supreme Court in the important but little known case of *Gray v. Hall*.[1] There the defendant filed his answer to the original complaint, and at the trial the plaintiff recovered judgment. Upon the defendant's appeal from the judgment it was reversed with directions that the plaintiff be permitted to amend his complaint for the purpose of showing that his cause of action was not barred by the running of the statute of limitations involved. In due course an amended complaint to this effect was filed and the defendant's demurrer thereto overruled. Although the defendant was given ten days in which to answer the amended pleading, he failed to do so and his default in this respect and a judgment based thereon were duly entered. This judgment became final.

Thereafter the plaintiff made an application in the reported proceeding for a writ of mandate to compel the defendant to assign the judgment as directed by its provisions. The defendant contended that the judgment was void on its face because his answer to the original complaint put in issue the material allegations of the amended complaint, thereby precluding the entry of a default for his failure to answer the latter.

Allegations Identical

The allegations of the amended complaint, with the exception of the added averments concerning the statute of limitations, were substantially identical to those contained in the original complaint. No different or additional cause of action was stated in the amended complaint. The Supreme Court observes that some of the earlier authorities discussed by it indicate that an amended complaint supersedes the original for all purposes, but after analyzing the actual holdings of these authorities, the court concludes that this blanket statement is too broad and partly *dicta*, since none of the issues raised and adjudicated in each case purported to cover a situation such as that here under discussion.

Negative Answer

Answering in the negative the question propounded at the commencement of this article, the court says at page 310:

"It has been generally held that where a plaintiff amends his declaration or complaint so as to change the cause of action, or add a new one, it constitutes an abandonment of the original issues, and judgment by default may be taken against the defendant if he fails to file a new or amended answer or plea within the time allowed therefor, notwithstanding the original answer or plea is still on file. (34 C. J. 164, Sec. 375d, and authorities there cited.) This rule is without application, however, where the amendment is merely as to formal or immaterial matters, and does not change the cause of action; nor does it apply where the original plea or answer set forth a sufficient defense to the declaration or complaint as amended."

Then follows the holding that it was error for the trial court to disregard the defendant's answer to the original complaint, and that, therefore, his default was improperly taken and entered.

Rule on Cross-Complaints

Apparently the rule enunciated extends to the failure of a plaintiff to answer a defendant's cross-complaint which raises the same issues presented by the defendant's answer and counter-claim. The entry of the plaintiff's default under such a cross-complaint does not bar him from proving the cause of action set out in his complaint.[2]

At this point it may be observed that not only practitioners but our trial and appellate courts often fail to distinguish between a cause of action as such and the various forms or counts in which the pleader has elected to state it. It is, of course, permissible to allege a cause of action in as many different counts as are available for

1. 203 Cal. 306.

2. Langford v. Langford, 136 Cal. 507.

the purpose, even to the extent of resorting to counts inconsistent in form.[3]

A familiar example of this inaccuracy is frequently found in actions for unpaid money. Usually the complaint alleges the ultimate facts of the transaction as a "First Cause of Action," and then restates the claim in several common counts denominated "Second Cause of Action, Third Cause of Action," etc., followed by a prayer for the one amount for which a recovery is sought. Confusion results because the impression is created that the pleader is asserting two or more separate and independent causes of action. Under such circumstances it is a misnomer to label each count a cause of action. Appropriate nomenclature for characterizing the various restatements of the same cause of action would remedy the difficulty mentioned.

Practical Test

The foregoing rule is applicable to a situation presented when a demurrer to a complaint is sustained on grounds of uncertainty, ambiguity or insufficient particularity, and the amended pleading attempts to cure such defects of form or detail. While the principle has been clearly stated by the Supreme Court, its application must necessarily be governed by the contents and effect of each particular pleading. A practical test for ascertaining whether the defendant will subject himself to the possibility of his default being properly entered for failing to answer the amended complaint, might be to ascertain whether the new or different allegations therein are such that if they are left undenied by the answer to the original complaint, the plaintiff would be entitled to a judgment on the pleadings. Of course, care should be exercised not to leave unanswered in the amended complaint and therefore admitted, averments that the defendant desires to put in issue and have proven by evidence at the trial.

While in the decision discussed the Supreme Court held the judgment to be voidable instead of void, and therefore not subject to collateral attack, the forcible dissenting opinions of Justices Preston and Shenk to the contrary are interesting, it being urged by them that the finding of voidability operates to deprive the defendant of his substantive rights without his day in court. It appears that if the clerk so improperly enters a default, it and any judgment based thereon is void.[4]

3. Goldwater v. Oltman, 210 Cal. 408.
Bank of Italy v. Spicer, 115 Cal. App. 612.
Los Angeles v. Blondeau, 127 Cal. App. 136.

4. Baird v. Smith, 216 Cal. 408.

Court Room Psychology

FOURTH INSTALLMENT OF A SERIES OF ARTICLES BY A JUDGE WHO HAS MADE A STUDY OF THE PSYCHOLOGICAL REACTIONS TO WHAT LAWYERS DO WHILE TRYING LAWSUITS

By Wilbur C. Curtis, Judge of the Los Angeles Municipal Court

This series of short articles on the phychology of trial work was prompted by the thought that a judge, having as he does, the opportunity of observing the work of hundreds of attorneys in the trial of the cases which come before him, is in an enviable position to accumulate a great portion of their combined knowledge and skill; and so in grateful appreciation to the lawyers, for what he has learned from them, the writer presents this discussion.

CHAPTER IV.

CROSS-EXAMINATION
OBJECTIONS AND MOTIONS

ABLE trial lawyers make very few objections to the admission of testimony in jury cases. Good psychology supports this practice.

In the first place nobody likes an objector. He quibbles. He is antagonistic. His personality is apt to offend the jury. Being called upon to decide the merits of a controversy, the jury naturally desires to obtain all the facts. For this reason the lawyer who seems anxious to aid it in obtaining them is more likely to be regarded as a friend than one who continually interposes objections.

Curiosity is the commonest trait of human nature. It craves satisfaction. This explains the success of the "Twenty Questions" features in magazines and newspapers in which the answers are printed on a different page. Anyone who reads the questions will invariably take the time to read the answers.

When an objection to a question is sustained the jurors are likely to be in the same frame of mind as one who has carefully read the questions and then found the page containing the answers missing.

It is far better to let the other fellow do the objecting. It is always possible in such cases to suggest that he does not want the jury to have all the facts.

Frequently the absence of objections upon one side will result in similar treatment from opposing counsel who does not wish to seem less courteous; with the result that sometimes evidence may be gotten before the jury which could not be admitted over objections.

The making of an objection suggests to the jury that the answer called for would be damaging to the case of the objecting party. If it is overruled the jury is then inclined to attach too great a significance to the answer.

The same reasoning applies to motions to strike, which serve no purpose except to protect the record for the purposes of appeal. Impressions once made upon the mind cannot be erased by an instruction from the court. In fact, instructions to disregard testimony only serve to emphasize it in the jury's mind.

If the motion is denied the objectional testimony is strengthened by the suggestion that the court deems it important. In either case the moving party gains nothing so far as its influence upon the jury is concerned.

We come now to a consideration of what has been termed the "art" of cross-examination.

There is something fascinating about cross-examination. Inexperienced young lawyers and older ones who infrequently go to court seize upon it like a hungry dog finding a bone. The opportunity to direct a conversation in which sarcasm and inuendo are not barred seems irresistible. If the lawyer has or thinks he has a dramatic sense this is his chance to display it. There is no doubt but that the average lawyer on cross-examination can fill the courtroom with his personality. But does

he accomplish anything else? Does he weaken the other fellow's case?

After listening to thousands of cases during six years on the bench, the writer is of the opinion that cross-examination as it is usually conducted does more to strengthen the opponent's case than to weaken it.

Leading the witness, as most lawyers do, over the same path which he covered on direct examination serves only to strengthen the impressions originally made by his testimony in the minds of the jurors. A child in school is taught by repetition. Many jurors have at least the intelligence of grammar school children, and it is reasonable to believe that they are able to learn in the same way.

Because of the greater freedom allowed for both questions and answers on cross-examination, witnesses usually bring out evidence which tends to strengthen their own or their friend's case, which would not have been admissible on direct examination. Many lawyers have won the other fellow's case for him by supplying a missing link on cross-examination.

The fact that the witness is in unfriendly hands stimulates his mental keenness. He is fencing with the lawyer. At every opportunity he will inject into his testimony things which he believes are favorable to his own case.

Extensive cross-examination based upon direct testimony also indicates a fear of such testimony and lends dignity to it in the minds of the jury.

One of the most successful Los Angeles trial lawyers seldom cross-examines an adverse witness upon his direct testimony unless he not only knows the witness is lying but is also able to prove it! This is probably the best general rule.

There are of course exceptions; one of which being where there are obvious discrepancies or improbabilities in the direct testimony. These may be properly pointed out and emphasized on cross-examination. Even in such cases great caution should be exercised because the witness may merely have made an honest mistake or slip of the tongue which cross-examination will give him an opportunity to correct and thus strengthen his position.

In ordinary cases the best plan seems to be to limit cross-examination to questions tending to show the interest or prejudice of the witness. Ignoring his direct testimony entirely suggests that it is either unimportant or unworthy of belief.

Most witnesses, if not parties to the action, are either friends, relatives or employees of a party. A few courteous questions tending to point out this fact will help to take the jury's mind off the testimony given by the witness as well as to cast some doubt upon it. Such questions also lay a foundation for arguing the credibility of witnesses at the close of the case.

Great latitude for such questions can usually be obtained by stating at the time of the first objection, if one is made, that the purpose is to show the interest and bias of the witness. This will also serve to plant valuable seed in the minds of the jurors.

Here is an example taken from the transcript of an actual case:

Question (by counsel for defendant): "I believe you said you were employed by the plaintiff? Is that right?

"Answer: Yes.

"Question: You're his secretary?

"Answer: Yes.

"Question: How long have you been so employed?

"Answer: Five years next month.

"Question: You are very loyal to your employer?

"Counsel for plaintiff: Objected to as incompetent, irrelevant and immaterial. Not proper cross-examination.

"The Court: Sustained.

"Counsel for defendant: But Your Honor, I intend to show the interest and bias of the witness.

"The Court: Very well. You may proceed.

"Question: You are loyal to your employer?

"Answer: I think so.

"Question: You wouldn't say anything to hurt him, would you?

"Answer: Of course not.

"Question: That's all."

A question as to whether or not the witness knows or has had any dealings with the party against whom he is testifying will often lead to a disclosure of facts tending to show animus or prejudice.

For instance:

"Question: Are you acquainted with the defendant?

"Answer: No.

"Question: Well you've known who he is for sometime, haven't you?
"Answer: Yes.
"Question: The fact is you have had some trouble with him, haven't you?
"Answer: Everybody in the neighborhood has had trouble with him.
"Question: In what way?
"Answer: He won't keep his dogs at home. They dig up everybody's lawn and you can't go out in your own yard without getting snapped at.
"Question: Did you ever ask the defendant to keep his dogs at home?
"Answer: Yes, several times.
"Question: What did he say?
"Answer: He told me to go to hell.
"Question: You're not very friendly toward the defendant are you?
"Answer: What? Oh I wouldn't say anything against him except the truth.
"Question: That's all."

Many litigants having sufficient means to do so make it a practice to compensate witnesses for expenses incurred in attending the trial and for time lost from their occupations. While there may be nothing improper in this, nevertheless its disclosure weakens the testimony of such witnesses in the opinion of the average juror who is himself compelled to serve for only two dollars a day.

A good example of this type of cross-examination is found in the record of a personal injury case tried by the writer while sitting in the Superior Court by Judicial Council Assignment.

The witness had given direct and positive testimony in favor of the defendant. Following is the cross-examination conducted by counsel for plaintiff:

"Question: Where did you say you lived?
"Answer: (Witness gave a Los Angeles address.)
"Question: You said you were a miner.
"Answer: Yes.
"Question: Where are you employed?
"Answer: The mine is up on the desert near Mojave.
"Question: You are working there now?
"Answer: Yes.
"Question: Have you been paid anything to come down here and testify?
"Answer: No.
"Question: Have you been promised anything?
"Answer: Just expenses.
"Question: How much is that?
"Answer: They said about a hundred dollars.
"Question: How far is it to the mine?
"Answer: One hundred and fourteen miles.
"Question: How did you come?
"Answer: I drove down.
"Question: What does your gas and oil cost for the trip?
"Answer: I guess about five dollars.
"Question: How much do you make a day at the mine?
"Answer: It figures four and a quarter a day.
"Question: Now lets see. You expect to get a hundred dollars for a trip that costs four dollars and losing three days pay at $4.25 a day. Is that right?
"Answer: Well, my room and meals cost something.
"Question: How much?
"Answer: Ten dollars maybe.
"Question: That will leave about $75.00 won't it?
"Answer: I haven't got it yet.
"Question: That's all."

In conclusion let us restate the proposition that as a general rule it seems better to limit cross-examination to questions tending to show animus, bias or prejudice on the part of the witness unless there are definite inconsistencies or improbabilities in the direct testimony which can be nailed down rather than corrected on cross-examination, or the testimony is known to be false and can be disproved.

In the next chapter we will discuss argument to the jury.

Pleading and Practice Committee Report

THE Committee on Pleading and Practice submitted to the Board of Trustees in December a statement of the matters that came before it during 1934, and the action of the committee thereon. THE BULLETIN presents the report, showing action taken by the Trustees. The report is signed by Mr. Trent G. Andrews, chairman. The members of the Committee, in addition to the chairman, are: Donald Barker, Harold B. Jeffery, Marcus Mattson, William Schreider, Paul Watkins, George W. Crouch, Leon T. David, Eugene H. Marcus, and Brenton L. Metzler, secretary. The report follows:

FIRST: *Procedure by Rule of Court.* "It was the sense of the Committee that, while it appears that procedure by rule of court has not yet been actually tried in sufficient manner to permit a conclusion as to its merits except by federal equity courts, such procedure should nevertheless be approved in principle, provided the rules do not include matters of remedy or substantive rights or matters bordering thereon." No attempt was made to draft the necessary rules, as we feel that the principle should be rather generally approved before undertaking the enormous amount of work which will be thereby entailed.

(The Board of Trustees approved of the above recommendation.)

SECOND: *Service of Summons on Natural Persons in Personal Actions,* having particular reference to those cases in which parties deliberately conceal themselves within the state. It is felt that a great abuse exists in this respect, but that to relax the present rule would be dangerous, hence no change is recommended. However, the Committee felt and recommended that Section 413 of the Code of Civil Procedure, relating to manner of publication of summons, should be amended in several respects, principally by shortening the period of publication from two months to four weeks. A draft of said Section 413 conforming to our recommendations is hereto attached.

(The Board votes that the recommendation to shorten the period of publication be not approved.)

THIRD: *Demurrers and Motions.* In this connection we consider the possible elimination of demurrers and the substitution of motions. It was the conclusion of the Committee that no recommendation of such change be made.

(The determination of the Committee with reference to Third above, was approved by the Board.)

FOURTH: *Summary Judgments.* We recommend that provisions for summary judgments should be made available to the defendant as well as to the plaintiff and also in a larger number of cases. A copy of the New York rule on this subject was submitted to the Committee, and the Committee recommended that the same provisions be adopted in California. This is covered in New York by Rule 113 in the Rules of Civil Practice, a copy of which is hereto attached.

(Mr. Belcher's committee agreed with the recommendations that the provisions of summary judgments be made available to defendants as well as to plaintiffs, but was not in accord with the recommendation that summary judgments be extended to a greater number of cases. Therefore the Board voted that Mr. Belcher's report be approved and that this item be referred back to the Pleading and Practice Committee with the suggestion that further comparison with the New York rule be made and a draft of any proposed legislation might possibly embody both.)

FIFTH: *Discovery Before Trial.* The object is to enable a lawyer to know what facts the other party will attempt to prove or disprove, in advance of trial, in order to effectively prepare his case. It was recommended by the Committee that Section 2032 of the Code of Civil Procedure relating to preparation, etc., of depositions be amended so as to require the witness to appear for the purposes of reading and signing the deposition within a certain time, authorizing the judge or officer taking the deposition to certify that the same is true and correct if such appearance be not made by the witness. A copy of said Section 2032 embracing our suggestions is hereto attached.

(This recommendation, having the approval of Mr. Belcher's committee, was approved by the Board.)

SIXTH: *Settling Issues Before Trial.* No recommendation as to this.

SEVENTH: *Selection of Trial Jurors.* This is an exceedingly important matter and one which had received some consideration from the 1933 Committee, which, however, had the matter before it but a short time. A draft of a proposed bill which was before that Committee had received our careful consideration, and members of this Committee took the matter up with the secretaries of the local Superior Court and the Municipal Court, respectively, both of whom were opposed to the proposition. The Committee, nevertheless, approved the general plan. Some amendments were made to the original draft, and copy which is hereto attached represents the final draft which the Committee recommends be adopted.

Mr. Belcher's committee reported with reference to this item as follows:

"The Committee has proposed a new system for the selection of trial jurors. We feel that this proposal should receive further and extended consideration before committing the Association to an approval thereof. Discussion with judges would probably be advisable. From a hasty consideration of this proposal we have been unable to satisfy ourselves that the changes would lead to the selection of a higher class of jury. We, therefore, make no recommendation as to the adoption of the Committee's proposals in this respect, preferring to leave the disposition of same to the determination of the entire Board of Trustees."

This matter was discussed at length and the following suggestions were made:

That Section 248 be considered in connection with any contemplated revamp; that a thorough study of the present system, including all steps taken in the selection of jurors where names are secured, etc., be made; that the committee should get the expressions of trial lawyers.

(It was voted that this item be recommitted to the committee for further consideration, and that Messrs. Belcher, Hahn and Praeger be requested to assist the committee.)

EIGHTH: *Cross-Complaint in Small Claims Court.* The Committee is opposed to this procedure.

(Recommitted to committee for further consideration.)

NINTH: *Appeal by Plaintiff in Small Claims.* The Committee is opposed to this procedure also.

TENTH: *A Single Form of Cross-Demand in Lieu of Cross-Complaint and Counterclaim.* This proposition received extensive consideration by the Committee, but it was finally concluded that no change in the present law is recommended.

(The Board voted that this item be recommitted to the committee with the suggestion that it confer with the State Bar Committee on Administration of Justice before making final recommendations thereon.)

SECTION 2032 C. C.

With reference to recommendation *Fifth*, the Committee submitted a draft of an Act to effect the change recommended. This proposed Act is set out below, the new matter being shown in italics:

An Act to Amend Section 2032 of the Code of Civil Procedure Relating to Preparation, Transmission and Use of Depositions as Evidence.

Sec. 2032. Depositions, how prepared, transmitted and used as evidence. Either party may attend the examination and put such questions direct and cross, as may be proper. *The judge or officer taking the deposition shall notify the witness when same is completed and ready for reading and signature; said notice shall state that unless the witness shall appear within five days after notice given that the judge or officer taking the deposition will certify that same is true and correct and make such disposition of it as hereinafter provided. The notice herein referred to shall be given to the attorney for the party whose witness has testified, if there be such attorney, or to the witness if there be no attorney, and may be served by mail.* The deposition, ~~when completed~~, must be ~~carefully~~ read *completely* to *or by* the witness and corrected by him in any particular if desired; it must then be subscribed by the witness, certified by the judge or officer

taking the deposition, but if certified to by an officer authorized to administer oaths, the certification must show that such officer and the person, if any, appointed by him to take the testimony of the witness, possess the qualifications set forth in section 2006; it must then be inclosed in an envelope or wrapper, sealed, and directed to the clerk of the court in which the action is pending or to such person as the parties in writing may agree upon, and either delivered by the judge or officer to the clerk or such person, or transmitted through the mail or by some safe private opportunity; and thereupon such deposition may be used by either party upon the trial or other proceeding against any party giving or receiving the notice, subject to all legal exceptions; but if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. *In event the witness shall fail to appear to read and subscribe the deposition within five days after notice is served or mailed as herein provided, or after reading shall fail to subscribe same, the judge or officer taking the deposition shall certify that same is true and correct and thereafter make such disposition as in the case where the witness has read and subscribed.* If the deposition be taken under subdivisions two, three and four, of section 2021, proof must be made at the trial that the witness continues absent or infirm, or is dead. The deposition thus taken may be also read in case of the death of the witness.

AND/OR

By Charles L. Bogue, Judge of the Superior Court

IN Porter vs. Herman, 8 Cal. 619, at page 623, Justice Field used the following language with respect to affirmative allegations made in the alternative or disjunctive:

"The allegation of the complaint is, that the money was 'collected and received by the defendant as the agent **or** attorney in fact, of the plaintiff.' This is, in substance, an allegation that the defendant collected the money **as agent,** or if he did not collect as agent, then he collected it as **attorney in fact.** If the defendant can be charged in this alternative form, he may with the same propriety be charged, in the disjunctive form, with the collection of the money in every character and capacity specified, thus: That the defendant was in possession of the money collected and received by him as the attorney, **or** factor, **or** broker, **or** agent, **or** clerk of the plaintiff, or in some other fiduciary capacity. Under no system of pleading would such alternative or disjunctive allegations be permitted. Stephen, in his Treatise on Pleading, lays down as rules, that 'pleadings must not be insensible, nor repugnant, nor ambiguous, nor doubtful in meaning, nor argumentative, nor in **the alternative,** nor by way of recital, but must be positive in their form.'"

This case has been followed in *Jameson vs. King,* 50 Cal. 132, and *Cliff vs. The California Spray Chemical Company,* 83 Cal. App. 424.

No one knows for sure what "and/or" means. Apparently those who use it have in mind making the allegation in the conjunctive and disjunctive, apparently with the idea of having an all-inclusive allegation. This object is clearly not attained. Under our system of pleading, the allegations of a complaint are construed against the pleader, and assuming that "and/or" is an allegation in the conjunctive as well as the disjunctive, certainly an ambiguity is set up and the opposing party would have the right to take the construction that favored him. Such a construction in almost every case would be for the opposing party to choose the disjunctive form, as when a man starts "and/or"-ing he usually has enough alternatives so that the opposing party can pick one that is entirely harmless. This form has been upheld by our Appellate Court in making denials, although criticized severely as sloppy pleading.

"And/or" is being used extensively in making affirmative allegations in pleadings. Legislators are adopting it although not on a very great scale. I have seen it used in Federal "New Deal" legislation, state statutes and ordinances of the City of Los Angeles.

"And/or" may have some place in our language, but I doubt it. Certainly it has no place in formal legal documents, such as pleadings, statutes and ordinances.

California Constitutional Conventions of 1878 and 1935

SOME PARALLELS—ECONOMIC, POLITICAL AND OTHERWISE

*By Carl T. Wheat, of the Los Angeles Bar

(PART TWO—Continued from December Bulletin)

During the course of the debates on these proposals C. C. O'Donnell, a Workingmens' Party delegate, defined the term "corporation" as "a corrupt combination of individuals, formed together for the purpose of escaping individual responsibility for their acts." Volney E. Howard, of Los Angeles, though opposed to stockholders' liability, declared that he was "in favor of abolishing corporations altogether, and substituting limited partnerships". Shafter, of San Francisco, protested against making the state the dry nurse of every individual citizen in the country, but the proposals were adopted by a large majority, the farmers joining with the workingmen delegates to carry them.

But it was on the subject of the regulation and control of railroad corporations that the chief debate occurred. After two decades of struggle for rail connection with the eastern states, during which time nearly every city and every county of the state had subscribed large sums for railroad stock in aid of construction, California found herself in the grip of a monopoly which—rightly or wrongly—meant to hold the saddle if it were humanly possible so to do. The majority of the delegates were intent upon securing effective regulation, and the demand for a "Railroad Commission" was insistent from the outset.

These were the days of the Tweed Ring in New York, and the scandals of the Credit Mobilier which marred Grant's presidency. Only recently Jay Gould, of the Erie Railroad, when questioned concerning a certain large account of that line labeled "India Rubber account," had frankly replied: "Why, that's our legislative expenses." And Collis P. Huntington later remarked of the period that it was troubled with the seven biblical elements—the five loaves and the two fishes.

"Talk about corruption," said a leading early lawyer of one of the party nominating conventions, "Why, the man in the moon held his nose as he passed over Sacramento that night".

Attempts at regulation were fought tooth and nail, and were denounced by the railroad group as "radical" and "socialistic". And to show that times have not changed in respect to the epithets we hurl at those who do not happen to agree with us, let me remind you that Colton, then one of the owners of the Central Pacific, bitterly denounced the demand for a rather mild sort of railroad regulation,—according to present standards—by sobbing about "the fearful communistic tendencies of the times." (I venture to say that the sound core of America was no more "communistic" then than it is today.)

Rates were made by the carriers to return *all* that the traffic would bear, and the uncontrolled power to make and alter rates was ruthlessly used to drive out threatened competition. In Los Angeles the feeling against the railroad combine ran especially high, and her two delegates, Volney E. Howard and J. J. Ayers, were bitter in their attitude. It was Howard who remarked, of Stanford's claim that the railroad paid half a million dollars annually in taxes, that the tax should have been three million, adding: "In my county and in others, they elect the assessor."

And it was Ayers who recalled with bitterness the fact that after Los Angeles county had subsidized the Los Angeles and San Pedro Railroad in the amount of $150,000, and after it had donated nearly $400,000 in order to have the Southern Pacific pass through Los Angeles, the railroad demanded $250,000 more, and forced Senator Jones to sell it the completed portion of his proposed "Los Angeles and Independence Railroad" between Los Angeles and Santa Monica by the simple expedient of reducing freight rates to Wilmington to $1.00 a ton, and then—when Jones was on his last legs—of buying him out for $400,000 less than the road had cost him, and then largely dismantling the Santa Monica line.

Railroad Rates

Nor could the public comprehend the intricacies of railroad rate procedure. A

contemporary writer complained that:

"When a carload of ordinary merchandise cost $340 from Chicago to Sacramento; if the car was stopped at Reno, one hundred and fifty miles east of Sacramento and run up the little fifty-mile road from Reno to the Comstock, the charge was $760. The through freight to Sacramento and the local freight back to Reno was exacted. When people complained, they were treated as enemies, and as nearly as possible the company owned the legislature, congressmen and judges of California." (Goodwin, C. C. "As I remember Them," 1913, pp. 68-9).

It is said that Mr. J. C. Stubbs, the able rate expert of the Central Pacific organization, was once asked by a San Francisco shipper for a rate on a carload of potatoes to Tucson, Arizona. He thought awhile and then asked:

"How much will the potatoes cost you?"

The shipper mentioned a figure.

"And how much can you get for them?"

The shipper stated his expectation in that regard.

Stubbs got out his pencil and finally named a rate,—which gave the shipper a modest profit and kept the difference for the railroad.

When the subject of railroad regulation became particularly hot before the convention, Stanford himself went to Sacramento to try to halt the onslaught. But the Committee on Corporations, headed by Estee, recommended a regulatory commission. One of the delegates, Clitus Barbour, demanded that railroads be declared public highways, with the right in all persons to run cars and locomotives over them. This was voted down, but the proposal of Ayers to prohibit the raising of rates if they had been reduced to drive out competition was adopted, with the proviso that the Railroad Commission could, on a proper showing, allow a later increase.

Railroad Commission

The Commission was to be composed of three men, elected by districts. It is unnecessary to consider here the innocuous inaction of that body during the thirty years of its desultory existence. That must be left for the history of public utility regulation in California, which is now being written. But Terry recognized the danger when he said:

"If they would give me the appointment of the commission, I do not know where I could find three men that I would be willing to trust so far. It is against the principle of the Lord's Prayer. These men are being led into temptations which they would be more than men if they could withstand."

The article on corporations was adopted by a vote of 83 to 33, and while it was not as severe as the Workingmens' Party delegates desired, it gave rise to the chief opposition in the press to the new Constitution. Today these provisions seem rather mild, but in 1878 they smacked of dangerous radicalism.

In the debates on revenue and taxation, the vital problem was the taxation of mortgages and other solvent debts. In the end a very definite attempt was made to relieve the condition of farmers and workingmen, who felt that they had been given the short end of the deal in the 1849 Constitution, which had, in the opinion of the delegates, in 1878, left far too much to the discretion of the Legislature.

Constitution Adopted

On the other articles, including the curious one on the Chinese, much time was spent, but the Convention concluded its labors on March 3, 1879, and the document was signed by 137 of the 152 delegates, an address to the voters being adopted by a vote of 103 to 30, which read in part:

"Considering the climate, situation and extent of our state, and the many varied, and almost irreconcilable interests of our people, our task has not been an easy one."

A bitter and acrimonious campaign followed. Practically all of the newspapers of the state opposed the document and urged that warehouses and factories would be closed, men would be thrown out of work, mines and farms would be idle, banks would close their doors, capital would flee the state, and general disaster would follow its adoption. The capitalists of the state were said to have financed a bureau which was set up in San Francisco to furnish literature opposing the new Constitution to every voter, and the *Los Angeles Express* asserted that two million dollars were spent in this effort. Many banks sent notices to their clients that if the Constitution carried they would be forced to increase the rate of interest on loans or call them in. And the claim was made that many mercantile and industrial establishments threatened their employees with discharge unless they voted against the Constitution.

Despite this propaganda the voters of the state on May 7, 1879, adopted the proposed fundamental law by a vote of 77,959 to

67,134, ninety per cent of the electorate actually voting at the election.

Present Constitution Unwieldy

Did disaster follow this action of the electorate? Of course not. Perhaps it is because of Daniel Webster's celebrated axiom that "The Lord helps babies, fools, and the United States," but whatever the cause, we seem to go on our way not greatly the worse for wear after even the most feared changes are made in our social fabric. Probably California has neither prospered more nor suffered more than other states because of her Constitution. And the chief complaint now made against it is that—with its multitudinous amendments—it has become an unwieldy code of laws, unalterable by the usual and ordinary methods of legislation. As a recent authority on the subject has remarked:

"We seem to delight in government by constitution rather than government under a constitution."

This will, in my opinion, be the chief task of the constitutional convention of 1935—to present to the people *a plan of government under a constitution.* With the development of those newer agencies of democracy, the initiative, the referendum and the recall, we need not be as fearful as were the delegates in 1878 of granting *proper and adequate* powers to the Legislature.

In 1878 the pay of the delegates was limited to 100 days, and, of course, when the 100 days had passed without final action there was much clamour for adjournment without completion of the document. It is submitted that the time was far too short, and equally that the number of delegates—152—was far too great. Even though the most able men of the state should be elected as delegates, and even though the convention should operate under the most efficient committee system, it is the present writer's conviction that the diverse economic and social interests of an hundred and fifty delegates, and their natural desire to be heard—if only for the benefit of their dear constituents—would preclude proper action by a body of such on our fundamental law. A convention of fifty would be preferable to one hundred and fifty, and even fifty delegates might prove unwieldy.

Much excellent work was done four years ago by a commission of fifteen men, appointed by Governor Young, pursuant to legislative resolution, to study the need for a revision of the Constitution, and to draft a model Constitution "for the consideration of the Legislature or of any constitutional convention hereafter held." It was a distinguished body, and the members of the commission were assisted in their labors by a small but able staff of experts.

It was their conclusion that "while the need of revision is plain, the extent to which it should go, and the principles upon which it should proceed are not so clear," and the commission's so-called "model constitution" was largely a mere rewording and reduction of the present document bringing the number of words (if that means anything as such, which is doubtful) down from 65,000 to 27,000.

The convention of 1935 may, therefore, start with much background work and research already accomplished. But if and when such a convention shall be held, we shall no doubt see brought before it many proposals with which we, as lawyers, will not agree. It is important that the men who are selected as delegates be men of force in the community, and men of judgment, but without a too-deep-seated fear of change merely because it is change; for democracy, as Mr. Justice Holmes has justly said, must be an elastic thing, and government must fit itself to meet new conditions as they arise. As the present writer views the problem, it is the job of the lawyers in the community to foster the exercise of judgment and the development of our fundamental law along sound but progressive lines.

Conclusion

In conclusion, it seems proper to remark that no group or faction should expect the millennium to follow the redrafting of our Constitution. Nor need any one expect or fear disaster, for whatever happens, this state will no doubt continue to "muddle along" amid changing conditions, even as it is said old England has been able to "muddle along" from generation to generation. A recent writer has put the case quite clearly, in discussing the very document here under consideration:

"A large number of the articles failed to accomplish the good they were intended to bring about; and the intent of others was nullified by the courts, or so twisted by legislation as to serve the very evils they were

designed to abolish. As a whole, however, the Constitution of 1879 was much more adapted to the needs of the state than the old Constitution of thirty years before. It is true that abuses flourished under it with all the vigor of a green bay tree. But the delegates to the convention had at least made an honest attempt to meet the needs of the time and to relieve the people of deep-seated grievances. They failed in many particulars; but in passing judgment upon them, one should remember that they were seeking to solve a perplexing variety of economic, social and political problems with which the people of the state themselves were not then qualified to deal. Even a perfect Constitution would not have brought the changes then desired." (Cleveland, p. 423.)

Note: References are to:

Cleveland, Robert, "A History of California, the American Period," 1922.

Swisher, Carl B., "A Study of Motivation and Political Technique in the California Constitutional Convention, 1878-79." (Pomona College, M. A. Thesis, 1927.)

See also:

Bryce, James, "The American Commonwealth," 1890.

Davis, W. J., "History of Political Conventions in California, 1849-1892," 1893.

Dunlap, R. H., "Constitutional Revision" (**Los Angeles Daily Journal**, Nov. 23, 1934).

Coy, Owen C., and Jones, Herbert C., "California's Constitution" (1930).

Report of the California Constitutional Commission, 1930.

Sargent, Noel, "The California Constitutional Convention of 1878-9," 6 California Law Review 1 (1917).

Challenging Jurors

IN the October issue of THE BULLETIN appears an article by Mark A. Hall, suggesting that to eliminate embarrassment in challenging jurors there be a secret method of exercising the peremptory challenge. Such a system prevails in the State of Arizona. See Section 1923, Revised Code of Arizona, 1928.

Under this system, in a civil case, twenty jurors are qualified. A complete list of jurors is then handed to the plaintiff, who strikes therefrom his four peremptory challenges, then it is delivered to the defendant, who strikes his four. The list is then handed back to the clerk, who calls the first twelve names remaining on the list, who constitute the jury.

The method of challenging jurors in criminal cases is covered by Sec. 5039 and 5040 of the Revised Code of Arizona, 1928. In the ordinary felony case, a panel of twenty-four jurors is selected, then the state may strike five and the defendant seven in the manner above provided.

In a trial where death penalty or life imprisonment may be imposed a panel of twenty-nine jurors is selected. The state then may strike seven names and the defendant ten.

Women's Junior Committee Meets

THE Women's Junior Committee of the Los Angeles Bar Association held its December meeting at the Rosslyn Hotel, Dr. Wendy Stewart, chairman, presiding.

V. Betty Doheney of Hines, California, spoke on "Legal Aspects of Water Rights in Relation to the Dairy Industry," discussion on the subject being led by J. Frances Emans who reviewed interesting cases dealing with riparian rights in this state.

Rena Brewster spoke on "Practical Difficulties in the Enforcement of the N.R.A. Codes," the discussion of this subject being opened by Jane Collins who outlined the methods of enforcement of the Petroleum Code.

The following officers were elected to serve for the year 1935, subject to confirmation by the Board of Trustees of the Los Angeles Bar Association:

Wendy Stewart, chairman.
Anna von Seggern, first vice-chairman.
Betty Graydon, second vice-chairman.
Ernestine Stalhut, secretary.

A committee was appointed to decide upon a place of meeting for the ensuing year, and members of the committee will be notified by letter of the place of meeting in January.

Opinion On Professional Ethics

ISSUED BY AMERICAN BAR ASSOCIATION

ATTORNEYS' FEES—*An attorney may, upon withdrawing from a case upon proper grounds, deduct the reasonable value of his services from his retainer.*

A prospective client gives an attorney a statement of facts which, if true, constitute a cause of action. The attorney accepted a retainer and prepared to bring suit. He did a very considerable amount of work in preparing the petition for the suit, and, in the course of that preparation, made an independent investigation of the facts which convinced him beyond any doubt, that his client's story was untrue, and that in his opinion his client had no cause of action. He thereupon advised the client that he would not bring the suit. He asks whether, under such circumstances, he should refund the entire retainer which he received, or whether he is entitled to charge against it a sum which would reasonably compensate him for his work in the matter.

The committee's opinion was stated by Mr. Evans, Messrs. Sutherland, Hinkley, Strother, Carney and Martin, concurring.

The withdrawal of the attorney from the employment is warranted by Canon 44 and his right to keep enough of the retainer to properly compensate him seems clear.

Insofar as the situation is disclosed by the question, his attorney proceeded in a thorough and prudent manner to discharge his duty. Before filing suit, he made an independent and apparently a thorough investigation and thereby discovered, first, that controlling facts were not as his client had represented them, and second, that the client really had no cause of action. The client was then notified that the attorney would not bring the suit. That it was proper, and also wholesome, to thus investigate the case is immediately manifest. If the attorney's legal conclusion was correct, then the client was saved, or at least had the opportunity of saving himself, the embarrassment and expense of bringing a foundationless lawsuit. He should be glad to pay well the attorney whose diligence and knowledge of the law thus protected him; and the attorney is obviously entitled to compensation. The retainer was paid to apply upon services to be thereafter rendered, and it follows that the attorney may, without professional impropriety, retain therefrom a reasonable amount for his services so rendered.

Items From the Board of Trustees

AT the request of the Municipal Light and Power Defense League, the Board of Trustees voted to request Governor Merriam to use his good offices to have a state sub-library, or department of legislative documents established in the County Law Library.

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The Association has renewed its lease on its offices in the Rowan building where it has been established for several years.

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A progress report of the Committee on Pleading and Practice has been presented to the Board, which was referred to a special committee consisting of Frank Belcher, chairman; Herbert L. Hahn and Arnold Praeger, who will report back at a later meeting.

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January Meeting: C. E. McDowell, chairman of the Speakers' Bureau, requested the Board to advise him as to a proposed joint meeting in January, to be participated in by all members of the State Bar, regardless of whether they are members of the Los Angeles Bar Association. Mr. McDowell was advised that the Board approved a joint meeting of the Los Angeles county members of the State Bar of California, and the members of the Los Angeles Bar Association. The details of the meeting were left to Mr. McDowell and his committee and Mr. Norman A. Bailie, president of the State Bar.

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